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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-602

HARSH BUILDING CO., an Oregon corporation;
HARSH INVESTMENT CORP., an Oregon corporation;
HAROLD J. SCHNITZER;
and HAROLD B. HUTCHINSON,

Petitioners,

v.

SAM BIALAC; JERRY BIALAC;
JAMES T. BLALAC; LEE BIALAC;
ALICE SUE ALTMAN; PARK LEE ENTERPRISES, INC.,
an Arizona corporation; and
RENTAL DEVELOPMENT CORPORATION
OF AMERICA, an Arizona corporation,

Respondents.

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION BELOW

The opinion of the court below is attached to the petition and reported as *Bialac v. Harsh Building Co.*, 463 F.2d 1185 (1972).

JURISDICTION

This was a state case removed on a claim of diversity. The Court of Appeals found no diversity and ordered remand, and this jurisdictional ruling is the matter disputed here. This Court has jurisdiction to review that question, 28 U.S.C. § 1254(1); *Aetna Cas. & Sur. Co. v. Flowers*, 330 U.S. 464, 467, 67 S. Ct. 798, 91 L. Ed. 1024 (1947).

QUESTION PRESENTED

Where a diverse principal place of business was admitted at the time of removal, but challenged before the end of plaintiffs' case, under what circumstances may remand be ordered?

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1332(a) provides jurisdiction in cases between citizens of different states and further provides:

> "(c) . . . a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . ."

STATEMENT OF THE CASE

This is a contract case involving the development and sale of a condominium project and shopping center in Phoenix, Arizona. Plaintiffs, respondents here, are residents of Arizona and California. The two key defendant corporations are both incorporated in Oregon. The defendants caused the case to be removed to the federal district court in Arizona from the Arizona state court, alleging that the two corporations not merely were incorporated in Oregon but had their principal place of business there.

In truth, Harsh Building Co. (HBC), one of the Oregon corporations, did in fact have no business at all, other than corporate housekeeping, except in Phoenix, Arizona, where it was entirely engaged in the condominium project and sales program. While the plaintiffs did stipulate prior to trial that the principal place

of business was in Oregon, facts to the contrary were developed at trial. Accordingly, before the plaintiffs had rested they objected to the jurisdiction on the grounds that there was no diversity.

The trial court considered the matter, found that it had jurisdiction, and directed a verdict on the merits for the defendants. The Court of Appeals reversed, finding that "the evidence showed that really the only business activity of Harsh Building Corporation [HBC] is owning and operating the Phoenix apartment complex which is the subject of this suit." It therefore applied the view that where all business activity is in one state, that state will be regarded as the principal place of business for diversity purposes, and ordered the remand. A petition for rehearing *en banc* was denied, the order noting that "[t]he suggestion of a rehearing en banc was passed to all active judges. None has requested a rehearing en banc." This petition followed.

ARGUMENT

The petition should be denied.

1. The first claimed error is that the decision of the Court of Appeals is based on the record as it stood at the end of the plantiffs' case, and that the defendants therefore were denied due process in that they were not permitted to "present evidence as to the principal place of business of HBC."

The facts were thoroughly considered at the trial court level by the trial judge before he made his own ruling. In the Court of Appeals the petitioners contended that the jurisdiction was sustained not merely by the stipulation but that it was "supported by other facts in the record." Petitioners asked no opportunity to make a further factual presentation in the district court and, in fact, successfully resisted respondents' attempt to do so (R. 2989, 3065). Moreover, petitioners do not at the present time name one single fact which they would offer to show error by the Court of Appeals. Under the remand statute, 28 U.S.C. § 1447, remand "shall" be made by the district court when "at any time before

final judgment it appears that the case was removed improvidently," and the burden of justifying the jurisdiction is upon the removing party; *Carson v. Dunham*, 121 U.S. 421, 7 S. Ct. 1030, 30 L. Ed. 992 (1887). Certainly petitioners' opposition to an evidentiary hearing in the district court and their failure to identify any fact they were deprived of showing, renders hollow their complaint as to the time and manner of decision.

2. Petitioners contend that the parties may stipulate to the jurisdiction of a district court by admitting facts on which it depends, and that having made such a stipulation, they cannot backtrack from it when further facts are available. The opposite was decided in *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951), except that in *Finn*, the question of jurisdiction was raised for the first time in the Court of Appeals, and by the party which had made the removal at that. Here the matter was raised before the end of the trial, and by the party which had been removed.

All of the policy arguments offered by petitioners have force. See in this connection the American Law Institute proposed revision of the judicial code, section 1386, which would modify *Finn* and enlarge the possibility of waiver of objections to federal jurisdiction. Even under that modification, "a party who has challenged the jurisdiction in the district court may raise the question on appeal"; see *ALI Study of the Division of Jurisdiction Between State and Federal Courts* 372 (1969). Here the respondents did make the challenge.

Perhaps Congress will be persuaded to modify the traditional rule; it may adopt section 1386. On the other hand, perhaps the desire to confine the federal jurisdiction may cause it to adhere to the traditional hard line against waiver. Nothing in the instant case calls upon this Court to anticipate the Congress and to junk its own precedents.

3. The petitioners contend that the court below should not have applied the "place of operations" test of principal place of business. No conflict is very seriously adduced on this point, but rather cases are suggested each of which depends on its peculiar facts. The rule is overwhelming that where a corporation is incorporated in state *A* and keeps its corporate records there but does all its actual business in state *B*, the principal place of business is state *B*. *See, e.g., Lurie Co. v. Loew's San Francisco Hotel Corp.*, 315 F. Supp. 405 (N.D. Cal. 1970); *Bruner v. Marjec, Inc.*, 250 F. Supp. 426 (W.D. Va. 1966); *Bullock v. Wiebe Constr. Co.*, 241 F. Supp. 961 (S.D. Iowa 1965); *Spector v. Rex Sierra Gold Corp.*, 227 F. Supp. 550 (S.D.N.Y. 1964); and *Hodges v. Georgia Kaolin Co.*, 207 F. Supp. 374 (M.D. Ga. 1962).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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November, 1972.